THE OWNERS OF THE SHIP OR VESSEL MT "ROWAN"

v.

THE OWNERS OF THE SHIP OR VESSEL OR PROPERTY "SINGAPURA TIMUR"

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[ADMIRALTY IN REM NO: 27-1-2001]
9 APRIL 2003

SHIPPING: *Action in rem - Admiralty jurisdiction - Maritime lien - Sunken vessel - Whether still a 'ship' - Whether a wreck - Whether could give rise to maritime lien - Whether subject to admiralty jurisdiction of court - Courts of Judicature Act 1964, ss. 23, 24(b) - United Kingdom Supreme Court Act 1981, ss. 20(1)(a), (2)(d), (3)(b), 21(3)*

STATUTORY INTERPRETATION: *Construction of statutes - Purposive approach - Courts of Judicature Act, s. 12(1) - Appointment of process servers by sheriff - Appointment of diver to execute service of writ in rem on sunken vessel - Whether within ambit of s. 12(1) - Whether valid - Courts of Judicature Act 1964, s. 12(1) & (2) - Rules of High Court 1980, O. 70 rr. 7(3) & 10*

WORDS & PHRASES: *'The sheriff or his officer' - Order 70 r. 7(3) RHC - Ambit and purview of phrase*

The plaintiffs' vessel MT 'ROWAN' and the defendants' vessel MV 'SINGAPURA TIMUR' were involved in a collision, resulting in the latter vessel to sink to the bottom of the sea. Thereupon the plaintiffs instituted an admiralty in rem action against MV 'SINGAPURA TIMUR' claiming for loss and damage. The defendants argued that the claim was unsustainable as the sunken vessel was a wreck and hence not a proper subject of an action in rem. It was argued that MV 'SINGAPURA TIMUR', being a wreck and having been lost to the sea, did not come within the description of "ship or property" under s. 21(3) of the United Kingdom Supreme Court Act 1981 ('UK SCA'), and so, could not be encumbered with any damage lien. The issue of admiralty jurisdiction apart, the defendants averred that service of the writ on MV 'SINGAPURA TIMUR', executed as it were by a diver appointed by the sheriff pursuant to a court order, was *ultra vires* O. 70 r. 7(3) Rules of the High Court 1980 ('RHC'). The learned registrar, having apparently subscribed to the arguments, struck out the plaintiffs' writ whereupon the plaintiffs appealed.

Before the learned judge, the plaintiffs argued that they had a maritime or damage lien on MV 'SINGAPURA TIMUR, bearing in mind s. 24(b) of the Courts of Judicature Act 1964 ('CJA') and ss. 20(1)(a), (2)(d), (3)(b) and 21(3) of the UK SCA. It was also contended that service of the writ by the sheriff's diver was valid, since O. 92 r. 4 RHC conferred upon the court an inherent jurisdiction to do so. The main issues that arose were: (i) whether the plaintiff had a maritime lien on MV SINGAPURA TIMUR; (ii) whether the admiralty jurisdiction of the court could be invoked over MV 'SINGAPURA TIMUR'; and (iii) whether service of the writ on MV 'SINGAPURA TIMUR' by the diver herein constituted a valid service.

Held:

[1] Section 24(b) of CJA expressly states that the civil jurisdiction of the High Court shall include the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981 ('UK SCA'). The admiralty jurisdiction of the High Court of Justice of England is expressly provided in ss. 20 to 24 of UK SCA, and by s. 21(3) & (4) thereof, a plaintiff may bring an action in rem against the ship where there is a maritime lien. (pp 742 e-f & 744 g)

[2] Under the general law of the sea, four classes of claims were treated as giving rise to maritime liens on ship including the class called collision damage or damage lien. That being so, s. 24(b) of CJA read with s. 21(3) & (4) of UK SCA gives due recognition to a claim in rem based on a maritime or damage lien. In the circumstances, this court has and can exercise jurisdiction in relation to the writ herein. (pp 744 h, 745 a & 746 d)

[2a] In any case, whether MV 'SINGAPURA TIMUR' is a total or partial loss or destruction is an issue which can only be decided at the full trial by way of consideration of *viva voce* evidence and not on mere affidavits. Similarly, whether or not MV "SINGAPURA TIMUR" is a ship or property within s. 21(3) of UK SCA or a wreck outside its ambit, is another issue which can only be determined by reference to the cross-examination and re-examination of witnesses at the full trial. (p 746 a-b)

[3] Under O. 70 r. 7(3) RHC service of a writ in rem is entrusted to 'the sheriff or his officer' and the mode of service is contained in O. 70 r. 10(1)(a) & (b) thereof. Section 12(1) CJA, on the other hand, provides

that "the registrar of the High Court shall be the sheriff and there shall be such bailiffs, process servers and other subordinate officers as are appointed ...". (pp 747 a-b & 747 f)

[3a] The operative language contained in s. 12(1), especially the words "there shall be such bailiffs, process servers and other subordinate officers as are appointed" can give rise to no ambiguity as to the legislative intent in relation to the appointment of eg. process servers to assist the sheriff in the exercise of the latter's functions including the service of this writ. Further, s. 12(1) contains no express or implied prohibition against the appointment of any particular person to be eg. a process server or as to the tenure of such appointment. That being so, the appointment may be a permanent, temporary or an *ad hoc* appointment such as the appointment of the diver herein for the specific purpose of effecting service of the writ. The *ad hoc* appointment of the diver has made the diver a process server for the purpose of s. 12(1) CJA. And by s. 12(2) CJA, such a diver is an officer of the sheriff having all the powers to execute the writ. (pp 747 h & 748 a-c)

[4] The powers of the court under s. 92 r. 4 RHC are very wide and would most certainly assist in the prevention of injustice, by making an order to appoint a diver to serve this writ in a manner consistent with the substantive provisions of s. 12(1) & (2) CJA and the procedural law in O. 70 rr.7 & 10 RHC. The defendant's contention in relation to the inapplicability of O. 92 r. 4 RHC is clearly devoid of merits. (p 749 g-h)

[Appeal allowed; registrar's decision set aside]

Case(s) referred to:

Adnan Hj Mat Jidin & Anor v. Irwan Wee Abdullah & Anor [1997] 3 CLJ 181 CA ***(refd)***

Aluminium Company of Malaysia Bhd v. Ng Than Chai & Anor [1994] 4 CLJ 97 HC ***(refd)***

Asia Pacific Parcel Tankers Pte Ltd v. The Owners of the Ship or Vessel 'Normar Spendour' [1999] 7 CLJ 213 HC ***(refd)***

Dan Sin Wah v. Chan Hai Swee [1951] 17 MLJ 189 ***(refd)***

Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors [1985] 2 MLJ 35 SC

Fothergill v. Monarch-Airlines HL (E) [1980] 3 WLR 221 HL ***(refd)***

Halcyon Isle Bankers Trust International Ltd v. Todd Shipyards Corporation [1980] 2 MLJ 217 ***(refd)***

Harmer v. Bell and Ors. The Bold Buccleugh [1851] 7 Moo PCC 267 ***(refd)***

Jayasankaran v. PP [1983] 1 CLJ 171; [1983] CLJ (Rep) 182 FC ***(refd)***

Kammins Ballrooms Co Ltd v. Zenith Investments (Torquay) Ltd [1971] AC 850 ***(refd)***

Karthiyayani & Anor v. Lee Leong Sin & Anor [1975] 1 MLJ 119 FC ***(refd)***
Master, Officers and Crew of SS "Hong Ho" v. SS "Hong Ho" [1929] SSLR 22 ***(refd)***
Northman v. Barnet Council [1978] 1 WLR 221 ***(refd)***
Ong Eng Chai v. China Insurance Co Ltd [1974] 1 MLJ 82 ***(refd)***
Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd [1984] 2 MLJ 143 ***(refd)***
Pemunya Kapal MV Brihope & Ors v. Emmanuel E Okwuosa & Ors [1996] 4 CLJ 461 CA ***(refd)***
Robinson v. Western Australian Museum 16 ALR 623 ***(foll)***
Tan Eng Choon v. Tay Boon See [1980] 2 MLJ 290 ***(refd)***
Tan Sung Mooi v. Too Miew Kim [1994] 2 AMR 1799 SC ***(refd)***
The Alexander [1812] 1 Dods 278 ***(refd)***
The "Beauty Orchid II"; Pacific Corporation Traders v. "Beauty Orchid II" Owners & Ors [1977] 2 MLJ 83 ***(refd)***
The Burns [1907] P 137 ***(refd)***
The City of Mecca [1879] 5 PD 29 ***(refd)***
The Co-operative Central Bank Ltd v. Feyen Development Sdn Bhd [1995] 4 CLJ 300 HC ***(refd)***
The Fordeco Nos 12 and 17; The Owners of and All Other Persons Interested in the Ships Fordeco No 12 and Fordeco No 17 v. Shanghai Hai Xing Shipping Co Ltd, the Owners of the Ship Mv Xin Hua 10 [2000] 1 CLJ 605 FC ***(refd)***
The Ocean Jade [1991] 2 MLJ 385 ***(refd)***
The Motor Emporium v. V Arumugam [1933] MLJ 276 ***(refd)***
The Neptune [1824] 1 Hag Adm 227 ***(refd)***
'The Santorini I': Owners of Cargo carried in the Ship 'Santorini I' v. Owners of the Ship and Other Persons Interested in the Ship 'Santorini I' [1994] 3 MLJ 709 ***(refd)***
The Victor [1860] Lush 72 ***(refd)***
The "Washi" ex p John Watt [1883] 2 Ky Ad 49 ***(refd)***
The Thermopyloe, Solomon & Anor v. Guthrie & Co [1890] 4 Ky 639 ***(refd)***
United Hokkien Cemetries, Penang v. The Board, Majlis Perbandaran Pulau Pinang [1979] 2 MLJ 121 ***(refd)***
Wong Pot Heng v. Hj Zainal Abidin Putih & Anor [1990] 2 CLJ 174; [1990] 1 CLJ (Rep) 312 SC ***(refd)***
Yap Chin Hock v. Minister of Home Affairs & Anor and Other Applications [1989] 2 CLJ 860; [1989] 2 CLJ (Rep) 673 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 4, 12(1), (2), 23, 24(b)
Criminal Procedure Code, s. 307(iv)
Rules of the High Court 1980, O. 12 r. 7, O. 70 rr. 7(3), 10(1)(a), O. 92 r. 4

Supreme Court Act 1981 [UK], ss. 20(1)(a), (b), (2)(d), (3)(b), 21(3), 24

Other source(s) referred to:
Malaysian High Court Practice, MLJ 2001, Issue 10, p 5760

For the plaintiff - Arun Krishnalingam; M/s Sativale Mathew Arun
For the defendant - Jainil Bhandari; M/s Lee Ong & Kandiah

Reported by WA Sharif

JUDGMENT

Low Hop Bing J:

Appeal

Several interesting and novel issues pertaining to practice and procedure were said to have been raised at the hearing of the defendants' application in encl. (33) before the learned registrar, wherein the defendants had on 25 January 2002 sought and succeeded in obtaining an order that the plaintiffs' writ in rem ("this writ"), service thereof on the defendants and all subsequent proceedings be set aside or struck off with costs ("the said decision"). This appeal in encl. (53) to me as judge in chambers was brought by the plaintiffs against the said decision.

Facts Of The Case

For the purposes of this appeal, the facts of the case are uncontroverted.

The unfolding of the narrative showed that on or about 28 May 2001, the plaintiffs' vessel MT "ROWAN" and the defendants' vessel MV 'SINGAPURA TIMUR" were involved in a collision in the Straits of Malacca ("the collision"). Shortly after the collision, MV "SINGAPURA TIMUR" sank in the approximate position of 01°58.5 Lat 102°14.2 Long and now remains on the seabed, and is presently still submerged underwater at a depth of 48 meters at the position where she sank.

By this writ, the plaintiffs claim against the ship or vessel or property MV "SINGAPURA TIMUR" for alleged loss and damage sustained in the collision.

On 11 June 2001, an order was made by the learned registrar on the plaintiffs' *ex parte* application dated 7 June 2001, appointing a diver to effect service of this writ on the property MV "SINGAPURA TIMUR".

This writ was served on or about 21 June 2001 by the diver appointed by the sheriff by attaching a laminated waterproof plastic copy thereof on the outer portion of the superstructure *viz*. "starboard gangway" and "midship railing" of MV "SINGAPURA TIMUR" while she laid on the seabed.

Vide letter dated 27 June 2001, the plaintiffs' solicitors gave notice to the defendants' solicitors that this writ has been served on MV "SINGAPURA TIMUR" at approximately 4.50pm on 21 June 2001 and also enclosed therewith a copy of this writ.

Issues For Determination

Respective learned counsel for both the plaintiffs and the defendants have apparently agreed that there are two issues for determination in this appeal. These issues may be formulated as follows:

1. Whether the admiralty jurisdiction of this court can be invoked in respect of a claim by the plaintiffs against the defendants MV "SINGAPURA TIMUR" which is presently submerged at a depth of 48 meters on the seabed as a result of the collission in the Straits of Malacca?

2. Whether service of this writ on MV "SINGAPURA TIMUR" by the diver appointed *vide* an order of the learned registrar is a proper and valid service?

Admiralty Jurisdiction

In urging this court to invoke admiralty jurisdiction, En. Arun Krishnalingam, learned counsel for the plaintiffs cited s. 24(b) of the Courts of Judicature Act 1964 ("CJA 1964") read with s. 20(1)(a), (b), (2)(d) and (3)(b); and s. 21(3) of the United Kingdom Supreme Court Act 1981 ("UK SCA 1981 Act").

He submitted that the plaintiff has a maritime lien or damage lien on MV "SINGAPURA TIMUR" and so may bring a claim in rem against that ship or property, which lien is not extinguished by a partial loss or destruction.

He added that MV "SINGAPURA TIMUR" lying on the seabed is a ship or property within the meaning of s. 21(3) of the UK SCA 1981 Act.

En. Jainil Bhandari, learned counsel for the defendants, contended that MV "SINGAPURA TIMUR" remaining on the seabed was a wreck and therefore not the proper subject of an action in rem, as the wreck could not come within the description of "ship or property" under s. 21(3) of the UK SCA 1981 Act.

He argued that the continued existence of MV "SINGAPURA TIMUR" ie, the res or property is an essential condition precedent to the availability of any maritime lien for enforcement through an action in rem against that res or property, and that with the loss or destruction of the res or property, having been lost to the sea, all liens in rem would consequently be extinguished.

He stressed that MV "SINGAPURA TIMUR" being a wreck cannot be encumbered with a damage lien and so no action can be maintained against MV "SINGAPURA TIMUR".

In my judgment, it is to be observed that although learned counsel for the defendant did not cite the order and rule pursuant to which he was applying to set aside or strike off this writ, it seems clear to me that O. 12 r. 7 of the Rules of High Court 1980 was relied upon by him as that was the procedural rule enacted for this purpose.

At the outset, it is necessary for me to restate our law relating to the exercise of admiralty jurisdiction by our courts.

Earlier law reports published in our country revealed that since 1883 our courts have already exercised admiralty jurisdiction: see eg, *The "Washi", ex parte John Watt* [1883] 2 Ky Ad. 49; *The Thermopylae, Solomon & Anor v. Guthrie & Co* [1890] 4 Ky 639; and *Master, Officers and Crew of SS "Hong Ho" v. SS "Hong Ho"* [1929] SSLR 22

Malaysian High Court Practice, MLJ Issue 7 p. 4539, explains that an action in rem is a real action in which a plaintiff claims that as against the whole world, the thing or res in dispute is his; and that an admiralty action in rem is actually directed against a res eg, a ship: *The City of Mecca* [1879] 5 PD 29 at 33; *The Burns* [1907] P 137; the cargo: *The Victor* [1860] Lush 72; *The Ocean Jade* [1991] 2 MLJ 385; or bunkers: s. 21(3) UK SCA 1981.

Section 23 of the CJA 1964 provides generally for the jurisdiction of the High Court to try civil proceedings, while s. 24 thereof contains specific provisions. Section 24(b) expressly states that the civil jurisdiction of the High Court shall include "the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981".

The admiralty jurisdiction of the High Court of Justice in England is expressly provided for in ss. 20 to 24 of the UK SCA 1981.

I shall only refer to the sections in so far as they are relevant to this judgment.

Section 20(1)(a), (b), (2)(d), (3)(b)(i), (ii) and (iii) of the UK SCA 1981 are reproduced as follows:

> 20(1) The Admiralty jurisdiction of the High Court shall be as follows, that is to say:
>
> (a) jurisdiction to hear and determine any of the questions and claims mentionend in subsection (2);
>
> (b) jurisdiction in relation to any of the proceedings mentioned in subsection (3);

(c) ...; and

(d) ...

(2) The questions and claims referred to in sub-section 1(a) are:

(a) ...;

(b) ...;

(c) ...;

(d) any claim for damage received by a ship;

(e) Any claim for damage done by a ship;

... (Paragraphs (f) to (s) are not relevant)

(3) The proceedings referred to in subsection (1)(b) are:

(a) ...;

(b) any action to enforce a claim for damage, loss of life or personal injury arising out of:

(i) a collision between ships; or

(ii) the carrying out of or omission to carry out a manoeuvre in the case of one or more of two or more ships; or

(iii) non compliance, on the part of one or more of two or more ships, with the collision regulations;

That our High Court enjoys the same jurisdiction and authority in relation to matters of admiralty as that stated above in the UK SCA 1981 does not appear to have been disputed by the parties herein, since the existence of such admiralty jurisdiction in Malaysia has never been doubted: *The "Beauty Orchid II"; Pacific Corporation Traders v. "Beauty Orchid II" Owners & Ors* [1977] 2 MLJ 83 per Arulanandom J; (*The Santorini I': Owners of Cargo carried in the Ship 'Santorini I' v. Owners of the Ship and Other Persons Interested in the Ship 'Santorini I'* [1994] 3 MLJ 709 per VC George J (later JCA); *Pemunya Kapal MV Brihope & Ors v. Emmanuel E Okwuosa & Ors* [1996] 4 CLJ 461 CA; *Asia Pacific Parcel Tankers Pte Ltd v. The Owners of the Ship or Vessel 'Normar Spendour'* [1999] 7 CLJ 213 Malik Ishak J; and *The Fordeco Nos 12 And 17; The owners of and all other persons interested in the ships Fordeco No 12 and Fordeco No 17 v. Shanghai Hai Xing Shipping Co Ltd, the owners of the ship Mv Xin Hua 10* [2000] 1 CLJ 605.

However, the bone of contention by the parties herein is whether this admiralty jurisdiction can be invoked over MV "SINGAPURA TIMUR" when she is lying on the seabed.

Some illumination has been incorporated in s. 21(3) and (4) of the UK SCA 1981 which provides as follows:

> 21 (1) ...
>
> (2) ...
>
> (3) In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action in rem may be brought in the High Court against that ship, aircraft or property.
>
> (4) In the case of any such claim as is mentioned in section 20(2)(e) to (r), where:
>
> (a) the claim arises in connection with a ship; and
>
> (b) the person who would be liable on the claim in an action *in personam* ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,
>
> an action in rem may (whether or not the claim gives rise to maritime lien on that ship) be brought in the High Court against:
>
> (i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by dermise; or
>
> (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

Under s. 21(3) and (4), it is clear to me that where there is a maritime lien, the plaintiff may bring an action in rem against that ship or property.

In the *"Halcyon Isle" Bankers Trust International Limited v. Todd Shipyards Corporation* [1980] 2 MLJ 217, Lord Diplock in delivering the majority judgment of the Privy Council held, *inter alia*, at p. 219B rt, that applying the general law of the sea, four classes of claims were treated as giving rise to maritime liens on ship and one such class is collision damage. This is popularly called damage lien.

That being the case, s. 24(b) of the CJA 1964 read with s. 21(3) and (4) of the UK SCA 1981 gives due recognition to a claim in rem based on a maritime or damage lien.

A damage lien attaches to the hull of the offending ship and also her appurtenances, that is, her tackle, apparel and furniture: *The Alexander* [1812] 1 Dods. 278 referred to in "*Maritime Liens*" by DR Thomas, 1980 p. 135.

A seaman has a right to cling to the last plank of his ship in satisfaction of his wages or part thereof: per Lord Stowell in *The Neptune* [1824] 1 Hag. Adm 227 at 239.

The judgment of Jervis CJ of the Privy Council in *Harmer v. Fell And Others. The Bold Buccleugh* [1851] 7 Moo PCC 267 has clearly expounded the nature of a maritime lien as follows:

> Having its origin in this rule of the civil law, a maritime lien is well defined by LORD TENTERDEN to mean a claim or privilege on a thing to be carried into effect by legal process; and STORY, J. (1 Summer 78) explains that process to be a proceeding in rem, and adds that wherever a lien or claim is given on the thing, then the Admiralty enforces it by a proceeding in rem, and indeed is the only court competent to enfarce it. A maritime lien is the foundation of the proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches, and whilst it must be admitted that where such a lien exists a proceeding in rem may be had, it will be found to be equally true that in all cases where a proceeding in rem is the proper course there a maritime lien exists, which gives a privilege or claim on the thing to be carried into effect by legal process. This claim or thing travels with the thing into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached.

A partial loss or destruction does not have the effect of extinguishing the maritime lien for such a lien attaches to each and every part of the res and in the event of only a part or fragment of the original res surviving, the maritime lien exists to a similar extent (see "*Maritime Liens*" by D.R. Thomas 1980, *supra*, p. 299).

The aforesaid grounds would have been sufficient to dispose of this issue relating to the jurisdiction of this court. However, *ex abundante cautela,* I have proceeded one step further to consider two additional questions in this particular case pertaining to total or partial loss or destruction; and the ambit of "ship, property or wreck".

In the instant case, whether MV "SINGAPURA TIMUR" is a total or partial loss or destruction is an issue which can only be decided at the full trial by way of mature consideration of *viva voce* evidence and not on mere affidavits.

Similarly, whether or not MV "SINGAPURA TIMUR" is a ship or property within s. 21(3) of the UK SCA 1981 or a wreck outside its ambit, is another issue which can only be determined by reference to the cross-examination and re-examination of the witnesses at the full trial as affidavits alone cannot yield a definitive result.

At this juncture, it is pertinent to observe that in *Robinson v. Western Australian Museum* ALR 623, the High Court of Australia (which is the apex court there) has the occasion to hold, *inter alia*, that a Dutch vessel *Gilt Dragon* and its contents sunk 287 nautical miles of the west coast of Australia in 1656, is maritime property over which the court has jurisdiction.

On the foregoing grounds, I am of the view that this court has and can exercise jurisdiction in relation to this writ. I am therefore unable to uphold the decision of the learned registrar. Similarly, I cannot legally sustain the submission of the defendants' learned counsel.

Service Of Writ By Sheriff's Diver

It was canvassed for the plaintiffs that service of this writ by the sheriff's diver who was appointed by an order of this court is valid since O. 92 r. 4 of the Rules of the High Court 1980 confers upon this court an inherent jurisdiction to do so, and since MV "SINGAPURA TIMUR" is lying on the seabed it was necessary to obtain an order of the court to enable the sheriff to appoint a diver to serve the writ on the sheriff's behalf, as there was a lacuna in the Rules of the High Court 1980.

The response of the defendants was that the order permitting the use of divers was *ultra vires* as O. 70 r. 7(3) only allows the service of this writ to be carried out either ty "the sheriff or his officers", and that there can be no delegation of the sheriff's powers.

It was also raised for the defendants that the plaintiffs' argument based on inherent jurisdiction is flawed, as O. 92 r. 4 is a procedural rule and is not intended to take away the substantive rights of the parties, and that recourse to inherent jurisdiction is not justified in the present case.

In my judgment, as O. 70 which regulates admiralty proceedings plays a pivotal role in the determination of the issue under this head, I shall refer to the relevant and pertinent portion thereof, where necessary.

Order 70 r. 7(3) reads as follows:

> (3) Where by virtue of this rule a writ is required to be served on any property, the plaintiff must leave the writ and a copy thereof at the Registry and file therein a praecipe in Form 159; and **where he does so the sheriff or his officer shall serve the writ** on the property described in the praecipe. (emphasis added)

The service of a writ in rem under O. 70 r. 7(3) is therefore entrusted to "the sheriff or his officer" and the mode of service is contained in O. 70 r. 10(1)(a) and (b) in the following words:

> **Service on ships, etc.: How effected (O. 70 r. 10)**
>
> 10.(1) Subject to paragraph (2), service of a warrant of arrest or writ in an action in rem against a ship, freight or cargo shall be effected by:
>
> (a) by affixing the warrant or writ for a short time on any mast of the ship or on the outside of any suitable part of the ship's superstructure; and
>
> (b) on removing the warrant or writ, leaving a copy of it affixed (in the case of the warrant) in its place or (in the case of the writ) on a sheltered, conspicuous part of the ship.

The question is now crystallized and it turns upon the task of statutory interpretation in order to ascertain the ambit and purview of the words "the sheriff or his officer' in O. 70 r. 7(3).

Section 12(1) of the CJA 1964 provides that "The registrar of the High Court shall be the sheriff and there shall be such bailiffs, **process servers** and other subordinate officers **as are appointed**" (emphasis added). The sheriff or his officer shall execute all writs etc. under s. 12(2) thereof.

In a detailed commentary on s. 12, the *Malaysian High Court Practice* MLJ Issue 7 at p. 4538 explained that as registrar of the High Court, the sheriff may appoint, *inter alia*, process servers to assist him in carrying out his duties, one of which is to effect service of a writ *in rem* on the vessel (O. 70 r. 7(3) and r. 10).

In my view, the operative language contained in s. 12(1), especially the words "there shall be such ... process servers ... as are appointed" can give rise to no doubt or ambiguity whatsoever as Parliament in its wisdom has clearly expressed its intention in relation to the appointment of eg, process servers to assist the sheriff in the exercise of the latter's functions including the service of this writ.

Further, s. 12(1) contains no express or implied prohibition against the appointment of any particular person to be eg, a process server or the tenure of such appointment. That being the case, the appointment may be a permanent, temporary or an *ad hoc* appointment, such as the appointment of the diver for the specific and sole purpose of effecting service of this writ. The operative words are in my view sufficiently wide to allow an *ad hoc* appointment. This is a substantive provision which should be construed liberally and widely.

The *ad hoc* appointment of the diver to serve this writ pursuant to an order of this court in the instant case would make the diver a process server for the purposes of s. 12(1) and the diver would then be an officer of the sheriff. The diver as such officer of the sheriff shall have the power to execute this writ under s. 12(2) which is another substantive provision.

It must be observed that under s. 4 of the CJA 1964, the CJA 1964 is only less supreme than the Federal Constitution, but overrides all other written laws in the event of any inconsistency or conflict, as seen in these words:

> 4. In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail.

My interpretation of s. 12(1) and (2) and O. 70 r. 7(3) and r. 10 is in my view fortified by the strongly entrenched rule of interpretation taking the shape of purposive interpretation, because to interpret otherwise would defeat the legislative purpose thereof and result in an absurdity and injustice, which should be avoided by the use of good and indeed common sense to remedy it. The avowed purpose of enacting s. 12(1) and (2) and O. 70 r. 7(3) and r. 10 is manifesty to promote, permit, enable or empower rather than to obstruct, prohibit, restrict or frustrate the service of this writ by the sheriff or his officers, and the liberal purposive approach adopted by me above is to conduce to or promote the general legislative purpose as enacted in these provisions.

The purposive approach of statutory interpretation has been adopted and applied in England since the 17th century as it has been the task of the judiciary to interpret an Act "according to the intent of them that made it": Coke 4 Inst. 330, as referred to by Chang Min Tat FJ (as he then was) in *United Hokkien Cemetries, Penang v. The Board, Majlis Perbandaran Pulau Pinang* [1979] 2 MLJ 121 FC, following Lord Diplock in *Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd.* [1971] AC 850 and Lord Denning MR in *Northman v. Barnet Council* [1978] 1 WLR 221.

This purposive approach has been consistently applied by our courts in the interpretation of statutes: see eg, per Wan Yahya (later FCJ) in *Tan Eng Choon v. Tay Boon See* [1980] 2 MLJ 290, 291 HC; and per Edgar Joseph Jr J (later FCJ) in *Yap Chin Hock v. Minister of Home Affairs & Anor and Other Applications* [1989] 2 CLJ 860; [1989] 2 CLJ (Rep) 673 HC; *Tan Sung Mooi (f) v. Too Miew Kim* [1994] 2 AMR 35:1799 SC; *Foo Loke Ying & Anor v. Television Broadcasts Ltd. & Ors.* [1985] 2 MLJ 35 SC; *Wong Pot Heng v. Hj. Zainal Abidin Putih & Anor.* [1990] 2 CLJ 174; [1990] 1 CLJ (Rep) 312 SC referring to *Fothergill v. Monarch-Airlines HL (E.)* [1980] 3 WLR 221 HL; *The Co-operative Central Bank Limited v. Feyen Development Sdn Bhd* [1995] 4 CLJ 300; and *Aluminium Company of Malaysia Berhad v. Ng Than Chai & Anor* [1994] 4 CLJ 97 HC.

Section 12(1) and (2) of the CJA 1964 and O. 70 r. 7(3) and r. 10 are capable of dispensing with the invocation of the inherent jurisdiction of the court as there is in my view no lacuna whatsoever. However, in the light of the strenuous submissions by both the learned counsel, it is appropriate for me to consider and proffer my view. O. 92 r. 4 reads:

> **4. Inherent powers of the Court (O. 92 r. 4)**
>
> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

The inherent jurisdiction of the court includes all the powers that are necessary to fulfil itself as a court of law; to uphold, to protect, and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner: per Edgar Joseph Jr J. (later FCJ) in *Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Bhd.* [1984] 2 MLJ 143, at 147; see also *The Motor Emporium v. V. Arumugam* [1933] MLJ 276, both of which were referred to in *Malaysian High Court Practice* MLJ 2001, Issue 10 p. 5760.

These powers are very wide and in my view would most certainly assist in the prevention of injustice, by making an order to appoint a diver to serve this writ in a manner consistent with the substantive provisions in s. 12(1) and (2) and the procedural law in O. 70 r. 7(3) and r. 10.

I therefore hold that the defendants' contention in relation to the inapplicability of O. 92 r. 4 is devoid of merits.

Further, the maxim *qui facit per alium facit per se* (he who does an act through another is deemed in law to do it himself) applies here. When the court-appointed diver effected service of this writ, it was in practice done at the instance of the sheriff and so the act of effecting such service is to be attributed to the sheriff who is deemed in law to do it himself, under O. 70 r. 7(3) and r. 10.

Illustrations of the application of this maxim abound in the cases which came up for consideration and determination by our courts.

In *Dan Sin Wah v. Chan Hai Swee* [1951] 17 MLJ 189, 193, Briggs J held that the execution of a document by a donee of a power of attorney granted pursuant to the Powers of Attorney Ordinance 1949 was an execution by the donor.

An insurance agent who was authorised to fill in and sign a proposal form was held to have done so on behalf of the policy holder, as the legal relationship of principal and agent was created in respect of the proposal form to effect the insurance in question: per Hashim Yeop A. Sani J (later CJ (M)) in *Ong Eng Chai v. China Insurance Co. Ltd.* [1974] 1 MLJ 82.

This maxim is an expression of the principle governing vicarious liability: per Raja Azlan Shah FJ (now HRH the Sultan of Perak) in *Karthiyayani & Anor. v. Lee Leong Sin & Anor.* [1975] 1 MLJ 119 FC. There a car owner was held liable because he has authorised or requested the act or because the driver is carrying out a task or duty delegated to him, or because hs is in control of the driver's conduct. This Federal Court decision was followed by the Court of Appeal in *Adnan bin Hj Mat Jidin & Anor v. Irwan Wee bin Abdullah & Anor* [1997] 3 CLJ 181.

The Federal Court in *Jayasankaran v. Public Prosecutor* [1983] 1 CLJ 171; [1983] CLJ (Rep) 182 held that a petition of appeal filed and signed by the solicitor in respect of an appeal against conviction under s. 307(iv) of the Criminal Procedure Code was held to have complied with the relevant portion of s. 307(iv) which reads the appellant shall lodge ... a petition of appeal ...". Although s. 307(iv) provides only for the appellant to file the petition of appeal and made no reference at all to the filing by the solicitor, the Federal Court held mat the law does not provide for the appellant to do so "personally" or "in person".

Therefore, the solicitor filing and signing the petition of appeal would suffice as it attracts the maxim *qui facit per alium facit per se*.

Conclusion

At this stage, I must record my appreciation to both the learned counsel for their relentless resilience in producing elaborate submissions and also to the learned registrar for his painstaking effort shown in his grounds of decision.

On the foregoing grounds, I hold that the answers to both the aforesaid issues for determination are in the affirmative, and that there are merits in the plaintiffs' appeal which I hereby allow with costs to be taxed after the full trial of the suit herein. The learned registrar's said decision is hereby set aside.